

UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD

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BRONX LOBSTER PLACE, LLC,

Employer,

and

Case No. 02-RC-191753

INTERNATIONAL ASSOCIATION OF  
MACHINISTS AND AEROSPACE WORKERS,  
AFL-CIO, DISTRICT LODGE 15,

Petitioner.

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**EMPLOYER BRONX LOBSTER PLACE'S MOTION TO STAY**  
**CERTIFICATION OF REPRESENTATIVE PENDING FILED**  
**REQUEST FOR REVIEW**

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Pursuant to Section 102.67(j) of the Board's Rules and Regulations, Lobster Place ("Employer" or "Lobster Place") respectfully moves to stay the Regional Director's certification of representative until the Board makes its final ruling on Lobster Place's pending Request for Review of the Regional Director's Decision and Certification of Representative ("Certification Decision").

## **I. BACKGROUND**

The International Association of Machinists & Aerospace Workers, AFL-CIO, District Lodge 15 ("Petitioner" or "Union") filed an election petition in this matter on January 24, 2017. A stipulated election agreement was reached on February 1, 2017, and an election was held on February 24, 2017. There were approximately 31 eligible voters. Four individuals did not vote and the results of the election could have been altered by just one of these votes.

Lobster Place filed timely objections to the election and a hearing on the objections was held on April 10, 2017. The Employer's objections were overruled, and the Regional Director issued the Certification Decision on October 20, 2017. The Employer filed its Request for Review with the Board on November 3, 2017. The Request for Review remains pending before the Board.

The Union has filed an unfair labor practice seeking to force the Employer to recognize and bargain with the Union while the Request for Review is pending. As set forth in detail below, if the Board fails to intervene and grant a stay, this would render the Lobster Place's statutory rights to request review and to challenge the underlying certification before the judicial system meaningless. Accordingly, we respectfully request the Board stay the certification until the Board issues its final ruling<sup>1</sup> on the Request for Review.

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<sup>1</sup> A final ruling for these purposes would be the Board's (1) denial of the Request; or (2) grant of the Request and subsequent decision on the merits.

## II. ARGUMENT

Ignoring for the moment the merits of the Request for Review, the procedural posture of this case alone warrants the extraordinary relief of a stay. The failure to issue a stay would effectively foreclose the Lobster Place's right to challenge the Certification Decision. If the Lobster Place is to obtain judicial review of the certification, it must refuse to bargain. The Union's current unfair labor practice charge seeks to force the Lobster Place into bargaining, which is the very act it cannot engage in if seeking to challenge the certification in federal court. *See Technicolor Gov't Services, Inc. v. NLRB*, 739 F.2d 323, 326 (8<sup>th</sup> Cir. 1984)(once an employer "recognizes a union by entering into negotiations with it, the employer has waived the objection that the certification is invalid"). In addition, it appears that until a final Board decision is issued on the Employer's Request for Review, the ability to seek judicial review would not be available. Accordingly, the practical effect of this certification and unfair labor practice would be to force the Employer to bargain until the time that the Board issues a final decision on the Request for Review, and only then, could the Lobster Place refuse to bargain in order to seek review through the judicial system. This makes no practical sense, forces the parties to engage in meaningless bargaining, and most importantly, it effectively denies the Employer the full and fair opportunity to request review and properly test certification through the federal courts by refusing to bargain because any bargaining would constitute a waiver of the right to test certification. The Employer should not be forced to recognize and bargain with the Union under threat of sanctions while the parties wait for a Board decision on the Request for Review. Under these extraordinary circumstances, we request that the Lobster Place be granted a stay until the Board makes its final ruling on the Request for Review.

Significantly, it was the Board's 2014 rulemaking that created the rule that a request for review will not operate as a stay unless specifically ordered by the Board. The fact that the

Board's 2014 rulemaking is currently under review<sup>2</sup> provides another basis for issuance of a stay while the Request for Review is pending, as the rule may potentially be revoked and/or significantly revised.

Finally, the merits of this case also warrant a stay. The Employer's Request for Review raises serious issues regarding the conduct of the election and the Regional Director's Certification. Specifically, the Regional Director ruled against the weight of Board authority in finding the following conduct was insufficient to overturn the results of a one-vote election: (1) the polls being effectively closed for nearly twenty minutes of the 1.5 hour afternoon session; (2) the Board Agent allowing the Union's observer to take a ten-minute unaccompanied break and providing guidance to the final voter of the afternoon; and (3) a defaced election notice. Under these circumstances, where the Regional Director's decision is against the weight of authority, it is likely that the Board's disposition of the Request for Review would overturn the certification, and therefore render any bargaining in the interim futile.

### **III. CONCLUSION**

Based on the foregoing, Lobster Place respectfully requests that the Board enter an order staying the Regional Director's certification of representative pending the Board's final ruling on Lobster Place's Request for Review.

Dated: December 15, 2017

Respectfully submitted,  
BOND, SCHOENECK & KING, PLLC

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<sup>2</sup> On December 14, 2017, the Board published a Request for Information in the Federal Register seeking public input on the Board's 2014 Election Rule.

**CERTIFICATE OF SERVICE**

I certify that copies of the foregoing BRONX LOBSTER PLACE EMPLOYER'S MOTION TO STAY ENTRY OF CERTIFICATION OF REPRESENTATIVE PENDING REQUEST FOR REVIEW, was e-filed in accordance with NLRB requirements and served via electronic mail, this December 15, 2017, upon:

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